

THE VALIDITY OF NOMINEE AGREEMENT MADE BEFORE A NOTARY

Firdo Lingga

Arabic, English, Japanese and International Language Institute (AEJI), Indonesia, E-mail: virdolingga@gmail.com

ARTICLE INFO

Keywords:

Consequences; Nominee;
Responsibility.

ABSTRACT

The purpose of this study is to find out and analyze the legal consequences and validity of the nominee agreement made before a notary. The approach method used in this study is a normative juridical approach, namely by examining reading sources that are relevant to the research theme, including research on legal principles, legal sources, statutory regulations that are scientific theoretical in nature and can analyze the issues discussed. The results of his research are the validity of a nominee agreement (borrow name) that occurs in Indonesia, when viewed from the Civil Code in Article 1320 regarding the legal requirements of an agreement, precisely on the objective conditions, namely paragraph 4 does not fulfill the legal requirements of an agreement. So that a Name Borrow Agreement that occurs in Indonesia, if viewed from the applicable law, it can be seen that the agreement is said to be null and void. A notary may be subject to sanctions in the form of civil, administrative and ethical sanctions, as well as criminal sanctions for the legal consequences arising from the nominee agreement deed he made, as long as the elements for imposing sanctions are fulfilled. Notaries may be subject to sanctions in the form of civil, administrative and code of ethics sanctions.

A. INTRODUCTION

The nominee agreement has actually been prohibited from being used under Article 33 paragraph (1) of Law No. 25 of 2007 concerning Capital Investment (UUPM) which states "Domestic investors and foreign investors who invest in the form of limited liability companies are prohibited from making agreements and/or statements confirming that ownership of shares in a limited liability company is for and on behalf of another person".

In this UUPM regulation, it only states that investors in the form of PT are prohibited from entering into name borrowing agreements. What if the nominee agreement is not executed by the investor in the form of a limited liability company? What if this nominee agreement is used by individuals to overcome problems in banking, is it against regulations or is it permitted? Because currently in practice there are notaries who make nominee agreements to help clients who have banking problems or foreigners who want to own land in Indonesia. Based on article 1320 of the Civil Code, if the four conditions for the validity of an agreement are met, an agreement made by a notary becomes a valid agreement.

The use of nominee agreements is also prohibited based on Article 26 paragraph (2) of the UUPA which states that "Indonesian citizens who have ownership rights to land cannot transfer their rights to foreigners, except with the permission of the Minister of Agrarian Affairs."

The problem of legal smuggling in the agrarian sector often occurs, because there are residents who still have the status of foreigners who indirectly obtain ownership rights to land within the country, namely by using a guise called strooman, by using ownership rights to land. For example, a foreigner wants to buy a piece of land with the right of ownership, he does not buy it directly but use the name of his friend who is an Indonesian citizen.

What if the name of a fellow Indonesian citizen is borrowed for land ownership in the KPR process at the bank, because the name of one of the parties has been blacklisted due to experiencing a bottleneck in the process of paying other credit installments. Is the nominee agreement permissible or invalid?

The purpose of this study is to find out and analyze the legal consequences and validity of nominee agreements made before a notary seen from the perspective of the legal terms of the agreement.

B. RESEARCH METHODS

This research uses normative juridical research methods, with the approach used in this legal research being the statute approach (legislative approach). The type of data used is secondary data, the data sources are primary, secondary and tertiary legal materials. Then the data collection method is through literature study. Lastly, the data analysis method uses a prescriptive method.

C. RESULTS AND DISCUSSION

Regarding the nominee agreement made by a notary with an authentic deed, it can be seen from the contents of the agreement whether it is contrary to the terms of the validity of the agreement as stipulated in Article 1320 of the Civil Code, where the agreement is a foreigner who has an interest in controlling land with private rights by borrowing the names of local residents. (nominee) when buying it, so actually the land purchased is owned by foreigners, local residents only borrow the name.

This nominee agreement is an agreement that is prohibited by law, because it can be said that nominee agreements are deliberately made to smuggle laws or circumvent laws.

The legal consequences that arise regarding the making of a nominee deed between local residents and foreign nationals are that the nominee agreement is null and void, this is caused because the nominee agreement made by the notary is an act of legal smuggling that is contrary to the provisions of Article 9, Article 21 and Article 26 Paragraph (2) of Law No. 5 of 1960 Concerning Basic Agrarian Regulations, which states that property rights to land are fully attached to Indonesian citizens and only Indonesian citizens can own property rights, furthermore on nominee agreements that it

also does not meet the objective requirements in the provisions of Article 1320 of the Civil Code, namely regarding lawful causes, which results in the nominee agreement being null and void. Nominee agreements are currently widely used in society for several reasons, including those who have been blacklisted by banks due to their inability to pay their installments, there are those whose BI Checking has entered collect 5 but want to take out a loan from the bank such as a mortgage or car loan. There are also those who avoid taxes, protect assets from creditors, or avoid the law, such as foreigners who want to own land in Indonesia.

If a nominee agreement is made through a notary, if it violates Article 1320 paragraph 4 of the Civil Code or law smuggling or there is a violation of the law and a party is harmed, then the deed made by the notary becomes invalid and null and void (the agreement is deemed to have never existed).

The legal consequences for a notary who makes a nominee agreement deed but violates the provisions above are that the notary may be subject to sanctions in the form of civil, administrative and ethical sanctions, as well as criminal sanctions on legal consequences arising from the nominee agreement deed he made, as long as the elements for imposing said sanctions are fulfilled.

Everyone is free to enter into agreements with anyone, even they are free to determine the form, content and terms of the agreement. However, many ordinary people do not understand that an agreement must meet the requirements for the validity of the agreement stipulated in Article 1320 of the Civil Code. In this case, if one of the parties to the agreement is harmed, it is very difficult to file a lawsuit, due to the invalidity of the agreement they made.

The validity of an agreement in Article 1320 BW contains subjective and objective elements. The subjective element is "the agreement of those who bind themselves" and "the ability to make an agreement". So if the subjective element is not fulfilled then the agreement can be canceled. Meanwhile, what is meant by an objective element is "a certain thing" and "causes that are allowed". If the objective elements are not met then the agreement is null and void (the original agreement was deemed to have never existed). The deed made by a Notary is based on the agreement of both interested parties. Thus the Notary Deed can be regarded as a form of agreement. Then the agreement made by a Notary, in it must also fulfill the elements of Article 1320 BW.

In relation to a nominee agreement for a halal cause, it turns out there are indications that the nominee agreement was made containing legal smuggling efforts carried out by the parties. Legal smuggling attempts related to the reason or background for making a nominee agreement, namely that a foreigner wants to control land with legal ownership rights, are legally prohibited in the applicable laws and regulations. This is based on Article 9 paragraph (1) in conjunction with Article 21 UUPA.

A Notary's mistake in consolidating a deed occurs when the Notary should normatively be aware of the prohibitions as intended in Article 26

paragraph (2) UUPA, but the notary is still willing to make the deed requested from him in the form of a nominee agreement deed. Therefore, if it turns out that the deed causes losses to the foreigner, then the notary concerned can be asked for personal responsibility to provide compensation as appropriate under civil law.

The important thing that must be considered when making a nominee agreement is that a nominee agreement must fulfill the requirements for the validity of an agreement, as regulated in outline in the provisions of Article 1320 of the Civil Code. This article must be enforced and must not be deviated from. If any of these conditions are not fulfilled, then the agreement can be requested to be canceled by the interested party or even null and void by law.

In making this nominee agreement there are obstacles or risks that can occur, namely the following:

1. The nominee agreement can be cancelled. If the nominee agreement is deemed invalid or contrary to law.
2. Nominee agreements can be abused.

The nominee agreement can be misused by the Owner or Nominee for illegal purposes, such as to avoid taxes or to protect assets from creditors or for banking purposes so that credit applications can be approved even though the person has bad or problematic BI Checking problems.

3. Nominee agreements can be complex. The owner may lose the land if the nominee is unable to fulfill his obligations.

Solutions to overcome obstacles that can occur in a nominee agreement made before a notary:

1. Owners should consult with a notary and attorney before entering into a nominee agreement.
2. The nominee agreement must be made in writing and signed by both parties.
3. The nominee agreement must be registered at the local Land Office.
4. The nominee agreement must be guaranteed by a bank or other financial institution.

This nominee agreement can still be carried out and made through a notary without violating Article 1320 paragraph 4 of the Civil Code, there is no legal smuggling and there is no violation of the law and no party is harmed.

D. CONCLUSION

The validity of a nominee agreement that occurs in Indonesia, if viewed from the applicable law, it can be seen that the agreement is said to be null and void. A notary may be subject to sanctions in the form of civil, administrative and ethical sanctions, as well as criminal sanctions for the legal consequences arising from the nominee agreement deed he made, as long as the elements for imposing sanctions are fulfilled. Notaries are

expected to be more careful and careful in making nominee agreements requested by clients and remain guided by applicable laws and regulations so that in the future it does not cause legal problems, both for the parties involved and for the notary concerned so that the notary is correct.

BIBLIOGRAPHY

Books:

Budiono, Herlien., 2009, *Ajaran Umum Hukum Perdata Bidang Kenotariatan*, Citra Aditya Bakti, Bandung;

Titik Triwulan dan Shinta Febrian., 2010, *Perlindungan Hukum bagi Pasien*, Prestasi Pustaka, Jakarta;

Journals:

Anisa Amalia & Umar Ma'ruf., The Tenure of Land by Foreigners through Nominee Agreements & Waarmerking by Notaries, *Jurnal Sultan Agung Notary Law Review*, Vol. 3, No. 2, 2021;

Chuasanga A., Ong Argo Victoria., Legal Principles Under Criminal Law in Indonesia and Thailand, *Jurnal Daulat Hukum*, Vol. 2, No. 1, 2019;

Deen, Thaufiq., Ong Argo Victoria & Sumain., Public Notary Services In Malaysia, *Jurnal Akta*, Vol. 5, No. 4, 2018;

Indah Permatasari Kosuma., Pertanggungjawaban Notaris Dalam Penyisipan Klausul Pelepasan Gugatan Notaris Atas Akta Yang Dibuatnya, *Notaire (Journal of Notarial Law)*, Vol. 4, No. 1, 2021;

Linda Vianty Mala Takko, I Nyoman Putu Budiarta & Anak Agung Sagung Laksmi Dewi., Perjanjian Nominee dan Akibat Hukumnya Menurut Sistem Hukum Positif Indonesia, *Jurnal Preferensi Hukum*, Vol. 2, No. 2, 2021;

M. Edwin Azhari, Ali Murtadho dan Djauhari., Tanggung Jawab Notaris Dalam Pembuatan Akta Perjanjian Nominee Dalam Kaitannya Dengan Kepemilikan Tanah Oleh Warga Negara Asing Di Lombok, *Jurnal Akta*, Vol. 5, No. 1, 2018;

Muharwan Syahroni, Muhammad Yamin Lubis & Mustamam., Akibat Hukum Hak Menguasai Tanah Oleh Orang Asing Dengan Menggunakan Nama Orang Lain (Studi Putusan No: 82/PDT.G/2013/PN.DPS), *Jurnal Hukum Kaidah*, Vol. 18, No. 1, 2018;

Ong Argo Victoria, Ade Riusma Ariyana, Devina Arifani., Code of Ethics and Position of Notary in Indonesia, *Sultan Agung Notary Law Review*, Vol. 2, No. 4, 2020;

Sumini & Amin Purnawan., Peran Notaris Dalam Membuat Akta Perjanjian Notariil, *Jurnal Akta*, Vol. 4, No. 4, 2017;

Yaya Kareng, Ong Argo Victoria, R. Juli Moertiyono., How Notary's Service in Thailand, *Sultan Agung Notary Law Review*, Vol. 1, No. 1, 2019;

Regulation

Civil Code (KUHPerdara);

Law No. 25 of 2007 concerning Investment (UUPM);

Law No. 5 of 1960 concerning Basic Agrarian Principles (UUPA).